

Spain Liberalizes Its Exchange Control Laws

In the last year a flurry of government measures has liberalized the nation's exchange control laws to an important extent. These measures have primarily dealt with the operation of nonresident bank accounts in Spain and the capacity of residents to obtain foreign currency, whether through loans or purchases. This article describes these measures and explains how they are changing Spain's traditionally stringent exchange control laws.

I. Background

Since 1961, when the convertibility of the peseta abroad was first decreed,¹ a seemingly never-ending stream of laws, decrees, resolutions, and directives created and minutely regulated a bewildering array of nonresident, peseta-denominated bank accounts. In an attempt to regulate all possible bank operations involving nonresidents, a succession of governments devised separate accounts with such colorful names as "Peseta-denominated Bank Accounts for Residents of Andorra,"² "Emigrant Savings Accounts,"³ "Ordinary-Peseta Tourist Accounts,"⁴ "Ordinary-Peseta Accounts for Construction Projects,"⁵ and "Foreign Account in Blocked Pesetas."⁶

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1. Decree 1146/1961 of July 15th.

2. Directive 283 of Mar. 8, 1972, from the Spanish Foreign Currency Institute [hereinafter I.E.M.E.], now extinct.

3. Royal Decree 1222/1977 of May 13th, *amended by* Directive 15/80 of Apr. 1st, from the Foreign Transactions Office.

4. Directive 283 of Mar. 8, 1972, from the I.E.M.E., *amended by* Directive from the I.E.M.E. of July 14, 1972.

5. *Id.*

6. Decree 313/1937 of July 5th, *amended by* Resolution from the I.E.M.E. of July 19, 1961, and Directive 283 of Mar. 8, 1972.

Apparently deciding that the best way to "clean the house" was by first organizing it, the Administration of Felipe Gonzalez issued a Royal Decree⁷ simplifying the multitude of existing nonresident, peseta-denominated bank accounts on August 28, 1985. In Royal Decree 1728/1985⁸ the Ministry of Economy and Finance pointed out that the basis of all of these accounts hinged on whether or not their proceeds could be converted into foreign currency. Based on this element, the Ministry decided to merge the unwieldy array of nonresident, peseta-denominated bank accounts into two categories: those that could be freely converted into foreign currency, to be called "Convertible Peseta Accounts," and those that could not be turned into foreign currency without prior government approval, to be termed "Ordinary Peseta Accounts."

II. Nonresident Convertible Peseta Accounts

The Administration's August decree left intact the existing legislation governing nonresident, convertible peseta-denominated bank accounts. In general, these measures establish a liberal regulatory scheme applicable to these accounts. Convertible peseta-denominated accounts may thus be opened by nonresidents, whether individuals or companies, without the need for prior government authorization.⁹ According to Spanish law, for exchange control purposes, a nonresident is an individual domiciled abroad or living primarily abroad; also included within this definition are foreign companies with head offices abroad.¹⁰

These accounts may only be opened with foreign currency or funds transferred from other nonresident, convertible peseta accounts.¹¹ Moreover, interest deriving from these accounts may be used to open other nonresident, convertible peseta accounts.¹² In addition, nonresident convertible peseta accounts may take the form of sight, savings, or term deposits.¹³ Prior government approval will be needed, however, for these accounts to take the form of certificates of deposit.¹⁴ The law states, furthermore, that residents may be paid with funds from these accounts.¹⁵ Most importantly, if throughout its existence the account has shown a

7. Royal Decree 1728/1985 of Aug. 28, 1985.

8. *Id.*

9. Decree 1146/1961 of July 15th, *amended by* Directive from the Bank of Spain of Jan. 23, 1981.

10. Royal Decree 2402/ 1980 of Oct. 10th.

11. Decree 1146/1961 of July 15th.

12. *Id.*

13. *Id.*

14. Directive from the Ministry of Finance and Commerce of Jan. 23, 1981.

15. Decree 1146/1961 of July 15th.

positive balance, the proceeds, including any earned interest, may be transferred abroad without the need for prior government approval.¹⁶

III. Nonresident Ordinary Peseta Accounts

Pesetas generated from operations within Spain, and therefore not originating from foreign currency transfers, may only be held in nonresident, ordinary peseta accounts.¹⁷ These accounts may include, for example, profits arising from the business activities of a foreign company in Spain. In the past, the laws prohibited the proceeds from nonresident, ordinary peseta accounts from being transferred abroad.¹⁸ Indeed, the laws stated that funds from these accounts could only be used to pay for living and other expenses in Spain.¹⁹ Moreover, prior government approval was required before these accounts could be opened.²⁰ On the eve of the country's entry in the European Community, however, the government paved the way for the liberalization of these accounts in a Resolution adopted by the Foreign Transactions Office (DGTE) on December 20, 1985.²¹

In this Resolution the DGTE authorized banks to open accounts in ordinary pesetas freely for nonresidents, whether individuals or companies.²² The main provisions of the Resolution, however, are contained in articles 4 and 5,²³ dealing with the operation and use of these accounts and the transferability abroad of their proceeds. In essence, these provisions establish a rather liberal regulatory scheme applicable to nonresident, ordinary peseta accounts. In article 4 the measure declares that the balance held in a nonresident, ordinary peseta bank account may be used for foreign investments in Spain. Moreover, this provision indicates that these investments will be governed by the Foreign Investments Law and its implementing regulations.²⁴ In addition, article 5 of the Resolution provides that when so used the proceeds from the foreign investment, whether in the form of profits or upon its liquidation, may be transferred

16. *Id.*

17. Resolution from the I.E.M.E. of July 19, 1961, amended by Directive 283 of Mar. 8, 1972.

18. *Id.*

19. *Id.*

20. *Id.*

21. B.O.E. No. 12 of Jan. 14, 1986.

22. *Id.* art. 1.

23. *Id.* arts. 4, 5.

24. Decrees 3021/1974 and 3022/1974 of Oct. 31st, from the Ministry of Commerce. The Foreign Investments Law contemplates a wide range of possible investments for nonresidents, from the purchase of Spanish companies to the acquisition of real estate. Moreover, according to article 3(4) of the Foreign Investment Law, such an investment may also include the purchase of public funds (Fondos Publicos) such as treasury bonds or private, fixed-income securities (Títulos Privados de Renta Fija), such as certificates of deposit.

whether in the form of profits or upon its liquidation, may be transferred abroad if the following conditions have been met:

- (a) The DGTE has issued a "positive assessment"²⁵ of the investment pursuant to Royal Decree 1042/85 of May 29, 1985, which effectively liberalized most foreign investments in Spain;
- (b) The document issued by a Notary Public "closing" the investment operation includes the DGTE's certificate of "positive assessment";
- (c) The investment has been recorded in the Register of Foreign Investments; and
- (d) The investment has remained in Spain for an uninterrupted period of at least three years.

Furthermore, the Resolution declared that interest payments arising from these accounts could be freely transferred abroad.²⁶ Finally, it made the exercise of all of these rights contingent on the existence of a positive balance in the account at all times.²⁷

For all of its importance, however, the Resolution left many questions unanswered, which are accompanied by "grey" areas in the law governing nonresident, ordinary peseta accounts. Moreover, the Resolution contains apparent contradictions within itself. Thus, although the Resolution states that the foreign investment need not be recorded in the Register of Foreign Investments, article 5(2)²⁸ of the measure seems to make such a recording a prerequisite for the transfer abroad of amounts derived from the investment. This condition would specifically affect investments in treasury bonds and securities which, unlike other types of foreign investments, have generally not been subject to such a recording requirement.²⁹ Moreover, the Resolution did not clearly indicate what type of ordinary peseta accounts could be opened by nonresidents without the need for prior government approval.

To clarify these issues, the DGTE issued a Directive on March 18, 1986³⁰ containing specific procedural and substantive provisions applicable to the new regulations on nonresident, ordinary peseta bank accounts. The Directive declares that these accounts may take the form of sight, savings, or term deposits.³¹ The Directive, however, specifically

25. Royal Decree 1042/85 opened up most of the Spanish economy to foreign investments, with the exception of certain key industrial sectors considered crucial to the national economy or defense. Although the measure generally allows foreign investments without the need for prior government approval, it nevertheless requires notification of the investment to the DGTE. The DGTE then has thirty days to issue either a positive or negative assessment of the foreign investment.

26. B.O.E. No. 12 of Jan. 14, 1986, art. 7.

27. *Id.* art. 6.

28. *Id.* art. 5(2).

29. Decree 3021/1974 of Oct. 31st, from the Ministry of Commerce, art. 3(4).

30. Directive 33/1986 of Mar. 18th, published in B.O.E. No. 88, Apr. 12, 1986.

31. *Id.*

exempts from the more favorable treatment set forth in the prior Resolution nonresident, ordinary peseta accounts in the form of certificates of deposit; prior government authorization will continue to be a prerequisite for the opening of this type of account.³²

The Directive also confirms that the proceeds from nonresident, ordinary peseta accounts may be used for foreign investments in Spain and then, subject to the conditions previously discussed, the amount of the investment may be transferred abroad.³³ In addition, the Directive states that interest deriving from nonresident, ordinary peseta accounts in the form of savings or sight deposits may be freely transferred abroad, without any limits.³⁴ Interest arising from short or long-term deposits, however, may be repatriated without prior DGTE approval up to a limit of 100,000 pesetas per liquidation period.³⁵ Amounts in excess of 100,000 pesetas will require the prior "verification" of the DGTE.

IV. Purchases of Foreign Currency

In the past year residents have also seen cumbersome exchange control laws severely limiting their access to foreign currency significantly relaxed. The new liberalization process began with a Directive from the central bank (Banco de España) easing to an important extent the traditionally stringent laws limiting the purchase of foreign currency futures.

The new regulations on the foreign currency market issued by the Banco de España on June 5, 1985, maintain the framework established by previous directives (specifically Directive 4/81 of January 30th as modified on April 3, 1984), but significantly widen the range of financial services and transactions that may be covered through the purchase of foreign currency futures.³⁶ Previously, only importers were authorized to purchase foreign currency futures. The new Directive, however, permits the purchase of foreign currency futures, without differentiating between importer or exporter, in any of the following areas:

A. SERVICES

Foreign currency futures may be purchased for the payment of services and transactions related to industry or commerce. Such services and transactions can include the cost of repairs to machinery, installation costs, technical assistance payments, payment of patent rights, and pay-

32. *Id.* Instruction One (2).

33. *Id.* Instruction One (4).

34. *Id.* Instruction Four (1).

35. *Id.* Instruction Four (3).

36. Directive 18/1985 of June 5th.

ment for the lease of machinery. Also permitted will be purchases of foreign currency futures to cover publicity costs and the expenses of transporting merchandise arising out of foreign trade. The new liberalized foreign currency purchase rules for residents will similarly encompass insurance contracts for commercial operations, payments related to the marketing of cinematographic and television rights and, significantly, tourism costs for travel agencies, hotels, and other tourism-oriented business.³⁷

B. CREDITS AND INTEREST

For the first time, residents are permitted to purchase foreign currency futures to make payments of principal and interest on their foreign loans, subject to the following conditions: (a) That the payment of principal and interest adhere to the repayment schedule approved by the Banco de España at the time it authorized the original loan; and (b) that the term of the loan does not exceed twelve months from the date upon which the resident contracts to purchase the foreign currency future.³⁸

C. FOREIGN LOANS

After it liberalized the purchase of foreign currency on an installment basis the Banco de España issued another significant directive, this one allowing residents to obtain loans in foreign currency or convertible pesetas up to a certain amount without the need for prior government authorization. The Directive of March 13, 1987,³⁹ freed the taking out of these loans from the requirement of prior government approval provided that: (a) The amount of the loan is not more than 1.5 million pesetas; (b) The loan is denominated in a currency quoted on the Spanish exchange markets in convertible pesetas or in European currency units (ECUs); (c) The average life of the loan is at least one year; and (d) The resident borrower is not a Spanish branch of the foreign lender.⁴⁰

Although prior approval will not be needed for loans meeting these requirements, the resident borrower must notify the loan to the Banco de España in order to obtain a "Financial Transaction Number." This number will then be used by the borrower's bank to process the loan.

Foreign loans in excess of 1.5 million pesetas, or otherwise not meeting the requirement mentioned above, will continue to need prior government authorization. The government's approval must now be given within fifteen working days, however, or the foreign loan will be considered as automatically authorized.

37. *Id.*

38. *Id.*

39. Directive 6/1987 of Mar. 13th, published in B.O.E. No. 110 of Mar. 27, 1987.

40. *Id.*